Filed 6/11/07 In re J.R. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.R., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. RICHARD F., Defendant and Appellant.	E041450 (Super.Ct.No. SWJ 004216) OPINION

APPEAL from the Superior Court of Riverside County. Robert W. Nagby, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed with directions.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Minor.

Appellant Richard F. (father) appeals from an order terminating his parental rights (Welf. & Inst. Code, § 366.26[1]) to his daughter, J.R.,[2] born in January 2005. Father contends there was improper notice under the Indian Child Welfare Act (ICWA).[3] Father complains that ICWA notice was incomplete and the trial court failed to make any ICWA notice findings in the case. Father requests this court to reverse the order terminating his parental rights and remand the case for proper ICWA notice and a new section 366.26 hearing.

Because mother stated in her response to form JV-130 that she may have had American Indian ancestry, ICWA notice compliance was required as to mother's lineage. ICWA notice was incomplete due to nondisclosure of background information for J.R.'s maternal grandparents and great-grandparents. We reverse the order terminating parental rights and remand for the limited purpose of allowing the DPSS to provide complete ICWA notice.

1. Factual and Procedural Background

Mother gave birth to J.R. in January 2005. Mother and J.R. both tested positive for marijuana. Mother retained custody of J.R. until the DPSS removed J.R. from

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[1] Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

[2] J.R.'s mother has not appealed.

[3] 25 United States Code section 1901 et seq.

mother's care in February 2005. Mother was homeless due to drug use and had left J.R. at home unattended.

In February 2005, the DPSS filed a juvenile dependency petition pursuant to section 300, subdivisions (b) and (g), alleging maternal drug abuse; child neglect and endangerment; and no provision for support. At the February detention hearing, the juvenile court found father to be J.R.'s alleged father, ordered paternity testing, and ordered mother and father each to file parental notification of Indian status form JV-130.

On February 15, 2005, a DPSS social worker called mother and asked her if there was any Native American ancestry in her or father's background. Mother said, "I don'[t] know the answer to that."

DPSS reported in its detention hearing report filed on February 16, 2005, that ICWA "Does or may apply. [Mother] said that she did not know the answer to having Native American Ancestry."

On February 17, 2005, mother filed a form JV-130 stating she might have Indian ancestry but she did not know the name of the tribe. She also stated that J.R. might be a member of, or eligible for membership in a Cherokee tribe or some other tribe.

On February 17, 2005, father filed a form JV-130 stating he might have Indian ancestry, and he and J.R. might be a member of, or eligible for membership in a Cherokee tribe.

The DPSS stated in its jurisdiction/disposition report, filed on March 15, 2005, that, based on father's statement that both his father and mother had Cherokee ancestry (although he was not sure of the tribe), the DPSS sent notices of involuntary child

custody proceedings for an Indian child (form SOC 820) to the Bureau of Indian Affairs (BIA), Indian Child & Family Services, Secretary of the Interior, Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians and United Keetowah Band. The notice forms, sent on March 2, 2005, included the names, addresses, and birth dates for J.R.'s parents and paternal grandparents. There was no information concerning her maternal grandparents or great-grandparents. With regard to mother, the notice form stated, "N/A" as to the "TRIBE, BAND, AND LOCATION." As to father, the notice stated, "Cherokee" but no information was provided regarding "TRIBE, BAND, AND LOCATION," as to the paternal grandparents.

On April 13, 2005, the DPSS sent out additional notices of involuntary child custody proceedings for an Indian child (form SOC 820) to the BIA, Indian Child & Family Services, Secretary of Interior, and Cherokee Nation of Oklahoma. The notices contained the same information as previously provided concerning J.R.'s and her relatives' Indian ancestry.

The DPSS received responses from Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians and United Keetowah Band stating J.R. was not considered an Indian Child.

At the jurisdictional hearing on April 27, 2005, the court found father to be J.R.'s biological father. The court also found J.R. to be a dependent of the court pursuant to section 300, subdivision (b) and ordered reunification services be provided to father. Father was married to another woman with whom he fathered two children. He was

separated from the woman. Father was disabled due to a heart condition. He lived with his parents.

According to the six-month status review report filed in October 2005, father was incarcerated for attempted rape charges and mother's whereabouts were unknown. In June 2005, J.R. had been placed with nonrelated extended paternal family members who wished to adopt J.R. The DPSS stated in the status review report that ICWA did not apply.

At the six-month review hearing on March 1, 2006, the court terminated reunification services and set a section 366.26 hearing (.26 hearing).

The DPSS once again stated in its .26 hearing report, filed on June 15, 2006, ICWA did not apply.

At the contested .26 hearing on July 27, 2006, counsel stipulated father would testify that he made several attempts to enroll in parenting and counseling programs at the facility where he was incarcerated but was unable to do so. He therefore requested a continuance of the hearing, which the trial court denied. Mother's whereabouts were still unknown. J.R. had been living with her prospective adoptive family for over one year and was doing well. The juvenile court found J.R. was likely to be adopted and terminated parental rights.

2. ICWA Notice

Father contends proper ICWA notice was not provided because the notice did not include any information concerning J.R.'s maternal grandparents or great-grandparents. Father also complains that the juvenile court did not make any ICWA findings.

A. Applicability of ICWA to Maternal Relatives

ICWA provides that when a child subject to a dependency proceeding is or may be of Native American heritage (referred to in ICWA as an "Indian child"), each tribe of which the child may be a member or eligible for membership must be notified of the dependency proceeding and of the tribe's right to intervene in the proceeding. (25 U.S.C. § 1912(a).) An "Indian child" for purposes of ICWA is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

"Determination of [a child's] tribal membership or eligibility for membership is made exclusively by the tribe." (Cal. Rules of Court, rule 5.664(g).) If proper notice is not given, the child, the parent, or the tribe may petition the court to invalidate the proceeding. (25 U.S.C. § 1914.)

Neither the child nor the parents need to be enrolled members of a tribe to trigger ICWA notice requirements. (See *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.) According to federal ICWA provisions incorporated into California law (Welf. & Inst. Code, §§ 224-224.3 and Cal. Rules of Court, rule 5.664(f)), notice must be given when the court "knows or has reason to know that an Indian child is involved, . . ." (25 U.S.C. § 1912(a).) A parent's suggestion that the child "might" be of Native American ancestry is enough to trigger the notice requirement. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.)

The information supplied by the mother in this case was sufficient to trigger ICWA's notice requirement.

DPSS urges this court to reject *In re Nikki R.* (2003) 106 Cal.App.4th 844, *In re Antoinette S., supra,* 104 Cal.App.4th 1401, and *In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, which require ICWA notice to be given when there is a mere hint or suggestion of Indian ancestry. We decline to do so. Courts have consistently held that the ICWA notice provision is triggered when there is any suggestion a child has Indian ancestry. (*In re Nikki R., supra,* at p. 848; *In re Antoinette S., supra,* 104 Cal.App.4th at pp. 1406-1408; and *In re Jeffrey A., supra*, 103 Cal.App.4th at p. 1107.)

As explained in *In re Miguel E., supra*, 120 Cal.App.4th at p. 549, "The notice requirement applies even if the Indian status of the child is uncertain. [Citation.] The showing required to trigger the statutory notice provisions is minimal; it is less than the showing needed to establish a child is an Indian child within the meaning of ICWA. [Citation.] A hint may suffice for this minimal showing. (*Ibid.*) 'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' (*In re Nikki R.[, supra,]* 106 Cal.App.4th [at p.] 848.)"

Here, mother's statement in her form JV-130 response triggered the need to comply with ICWA notice requirements as to J.R.'s maternal relatives.

B. Noncompliance With ICWA Notice Requirements

In order to comply with ICWA notice requirements, the social services agency must notify the child's tribe, by registered mail with return receipt requested, of the

pending proceedings and of its right to intervene. (25 U.S.C. § 1912(a).) If there is more than one possible tribal affiliation, the agency must provide notice to each tribe through the tribe's chairperson or its designated agent for service of process, as published in the Federal Register. (*In re H.A.* (2002) 103 Cal.App.4th 1206, 1213; 25 U.S.C. § 1912(a); California Rules of Court, rule 5.664(f)(2); § 224.2, subd. (a).)

ICWA notice must include all required information, including the child's name, date of birth, and place of birth; the name of the tribe or tribes in which the child is enrolled or in which the child may be eligible for enrollment; the names, and current and former addresses, of *the child's biological parents, grandparents and great-grandparents, along with the birth dates, places of birth and death, and tribal enrollment numbers, and/or other identifying information*; and a copy of the petition, complaint or other document by which the proceeding was initiated. (25 C.F.R. § 23.11(a), (d) & (e) (2005); see also Cal. Rules of Court, rule 5.664.)

When the notice contains insufficient information, it is effectively meaningless. (*In re D.T.* (2003) 113 Cal.App.4th 1449, 1455.) Because the failure to give proper notice forecloses participation by interested Indian tribes, ICWA notice requirements are strictly construed, and strict compliance is required. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475.)

Father does not dispute that ICWA notice was proper as to his side of the family. Father argues there was noncompliance with ICWA because notice was inadequate as to mother's ancestry. Although initially mother told the social worker she did not know if she had any Native American ancestry, mother later stated in her form JV-130 that she

might have Indian ancestry and J.R. might be a member of, or eligible for membership in a Cherokee tribe or some other tribe. It is unclear from mother's response as to whether her reference to possible Cherokee ancestry was based solely on J.R.'s paternal ancestry or on her maternal Indian ancestry.

After mother filed her response to form JV-130, indicating she might have Indian ancestry, the DPSS reported in its jurisdiction/disposition report that, based solely on father's statements of Native American ancestry, ICWA notice had been provided. There were no ICWA findings of notice compliance as to maternal relatives. There was also no information provided in the ICWA notice forms concerning mother's relatives.

The record thus shows the DPSS did not comply with ICWA notice requirements as to J.R.'s maternal relatives. At a minimum, the DPSS should have included background information concerning J.R.'s maternal grandmother in the ICWA notice since the record shows that the DPSS was in contact with her and she appeared in court at several hearings in the case. The maternal grandmother's address and telephone number are also included in the jurisdiction/disposition hearing report. The DPSS also could have asked J.R.'s maternal grandmother for background information as to J.R.'s other maternal relatives and whether they had any American Indian ancestry.

Here, the record shows the DPSS provided ICWA notice as to J.R.'s paternal relatives but not as to J.R.'s maternal relatives. The ICWA notices thus did not contain all of the required information. The record also reflects that the juvenile court did not make any findings as to the applicability of ICWA or the sufficiency of the notices as to J.R.'s maternal relatives.

Accordingly, we reverse the order terminating father's parental rights to J.R. and remand this matter to the trial court with directions to order the DPSS to comply with ICWA notice requirements and with all applicable state and federal laws and rules.

C. Harmless Error

The DPSS argues that any deficiency in ICWA notice due to not identifying J.R.'s maternal grandparents and great-grandparents was harmless error and waived.

There was no waiver of father's ICWA notice objection. As stated in *In re Nikki R.*, *supra*, 106 Cal.App.4th at p. 849, "Case law is clear that the issue of ICWA notice is not waived by the parent's failure to first raise it in the trial court. [Citation.] And two recent cases[, *In re Marinna J.* (2001) 90 Cal.App.4th 731; *Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th 247,] have concluded it is not waived by the parent's failure to appeal the claimed error at the earliest opportunity. . . . [¶] . . . [¶] . . . The notice requirement is designed to protect the interests of the tribe; to the extent a notice defect impairs the tribe's ability to participate, another party cannot waive it."

We also reject the DPSS's harmless error contention. The DPSS argues that the omission was harmless because there was no evidence that the DPSS had information regarding the great-grandparents. The DPSS acknowledges in its respondent's brief, "it did know the maternal grandmother's name, address and telephone number," but claims that the absence of this information regarding the maternal grandmother was not fatal to noticing under ICWA because J.R.'s Indian ancestry was inherited from father.

This is circular reasoning at best. How is it known that J.R.'s Indian ancestry was inherited solely from her father when ICWA notice was deficient in not including

background information regarding J.R.'s maternal relatives necessary for a meaningful investigation? Mother stated she may have Indian ancestry. ICWA notice was thus required as to her ancestry, and was deficient due to the failure to provide all necessary and available information which might assist in determining whether J.R. had any Indian ancestry through her mother's lineage.

The absence of requisite information concerning J.R.'s grandparents and great-grandparents is significant particularly since "'"[P]arents are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe and those of each other. [Citation.]"' [Citations.] 'We agree that "[t]o maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child. [Citation.]"' [Citation.]" (*In re Miguel E., supra,* 120 Cal.App.4th at p. 549.)

We conclude the failure to include in the ICWA notices requisite information identifying J.R.'s maternal grandparents and great-grandparents constitutes reversible error and requires remand for the limited purpose of providing proper and complete ICWA notice.

3. Disposition

The order terminating father's parental rights to J.R. and placing her for adoption is reversed. The juvenile court is directed to order DPSS to give notice in compliance with ICWA. If, after 60 days after sending notice, no determinative response is received, the court shall determine that ICWA does not apply and shall reinstate the original orders.

(Cal. Rules of Court, rule 5.664(f)(6).) If a determinative response is received within 60 days, the court shall proceed in accordance with that response -- if it is determined that the child is not an Indian child, then the order terminating parental rights shall be reinstated; if it is determined that the child is an Indian child, the court shall set a new .26 hearing which shall be conducted in accordance with ICWA and all pertinent state and federal laws and rules.

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s/Hollenhorst
J.

We concur:

s/Ramirez
P. J.

s/King
J.